

DECISION

M. Boyle PLF
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

8669

FILE:

B-193109

DATE: December 22, 1978

MATTER OF:

[Department of the Interior--request for
advance decision]

DIGEST:

1. No award may properly be made under a solicitation that does not contain current affirmative action provisions required in federally financed contracts or subcontracts, since such omission is material, and readvertisement is required.
2. *for* Indian Self-Determination and Education Assistance Act does not require award to Indian-owned economic enterprises because statute and regulations call for preference "to the greatest extent feasible," thus conferring broad, discretionary authority. *71*, Approval or disapproval by Department of Interior of proposed subcontract awards will not be disturbed by GAO unless *arbitrary*, capricious, or in violation of law or regulations.

The Department of the Interior, Bureau of Indian Affairs, requests an advance decision on whether it would be proper to approve a subcontract award to either of two competing firms where the low bidder, a non-Indian-owned firm, did not certify compliance with the Arizona Plan--an affirmative action program--and where the next low bidder, an Indian-owned firm, bid in excess of the amount of money available for the project.

Pursuant to a contract awarded to Alchesay High School District No. 20 (Alchesay), Whiteriver, Arizona, Alchesay is responsible for the design, construction, and equipment of a complete school facility. Under a subcontract with an architect, the new Alchesay High School was designed and the architect administered the bidding process and conducted the bid opening. Alchesay selected option "B" as the best combination for consideration. Oakland Construction Company, Inc. (Oakland) was the low bidder at \$6,900,000 and Chuska Development Co.'s (Chuska) bid was \$7,539,371.

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Interior reports that after bid opening it was discovered that Okland did not certify the Arizona Plan but Chuska's bid did contain that certification. However, Interior also reports that it was advised that the Arizona Plan may no longer be required; therefore, certification of the Arizona Plan may be inconsequential.

Finally, Interior notes that Public Law No. 93-638, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b)(2) (1976), requires award of subcontracts to Indian preference eligible firms such as Chuska. Interior also notes that Chuska is ready to negotiate if the award is made to it--presumably Chuska would alter its price which is now about \$300,000 over budget of \$7,221,553. Alchesay, however, recommends award be made to Okland.

In this factual context, Interior raises these questions:

1. If award is made to the low bidder, may the Arizona Plan requirement be waived?
2. Does Public Law 93-638 require that award be made to Chuska, even though its bid was very high?
3. Should Alchesay be advised that the project must be readvertised?

We requested the views of Okland, Chuska, Alchesay and its architect, and the Arizona Department of Education. Responses from that request and the record provided by Interior form the factual basis for our decision.

The solicitation contained form CS-132 (SF 2/72), which provides, in pertinent part, as follows:

"BID CONDITIONS - ARIZONA PLAN

"All Bidders must comply with the provisions of the Arizona Plan incorporated in Part I of these bid conditions or the affirmative action program set forth in Part II of these bid conditions to be considered responsible bidders, and hence eligible for award of a contract for this project.

* * * * *

"Part I: To be eligible for award of a prime contract on this project, a bidder who will himself perform work on the project in one or more trades with respect to which he is a participant in the Arizona Plan * * * must execute and submit as part of his bid the following certification, which, as executed and submitted, shall be deemed a part of the contract specifications for the project * * *."

(A two-page certification followed this paragraph and at the end the bidder's authorized representative was required to sign.)

"Part II: A. Coverage. The provisions of this Part II requiring the submission of an affirmative-action plan shall be applicable to any prime contractor bidder with respect to whose prime contract any work will be performed thereunder in any trade by a contractor or subcontractor who is not (at the time of bid opening for the prime contract) a participant, with a labor organization for which there are [Office of Federal Contract Compliance (OFCC)] - approved minority utilization goals, in the [Arizona] Plan as to the trade or trades."

(At the end of Part II, the bidder's authorized representative was required to sign a commitment to an affirmative action plan meeting the criteria of Part II.)

"Part IV. Responsiveness and Responsibility. Any EEO submission required to be made by the prospective prime contractor pursuant either to Part I or Part II of these 'Bid Conditions' which is material and which will govern the EEO performance of contractors and/or subcontractors during the term of performance of this project must be made as a part of the bid to the Owner. Failure to submit a Part I certification and/or a Part II affirmative action plan (or certification) as applicable will render the bid nonresponsive.* * *

"Part V: Compliance and Enforcement. Following is a list of trades for which there are OFCC-approved goals of minority manpower utilization for the geographic area:

"No trade commitments of goals and timetables." (Footnotes omitted and emphasis supplied.)

Okland did not execute and submit part I or part II with its bid. Nevertheless, Okland asserts that since it is compliant with the Arizona Bid Conditions, there is no necessity for waiver of these conditions and its bid is thus responsive to the contract requirement. Okland states that our Office has found that the fact that a solicitation expressly directs a bidder to sign a certificate agreeing to comply with an affirmative action plan (AAP) is not decisive of the issue of whether a bid is responsive if the bidder fails to execute the directed certification. Citing Astro Pak Corporation/Diversified Chemical Corp., B-183536, August 8, 1975, 75-2 CPD 97, and Armor Elevator Company, Inc., B-190572, March 30, 1978, 78-1 CPD 250, Okland contends that our Office has recognized that a bidder may make the requisite commitment to AAP requirements in ways other than that specified in the solicitation, and that execution of the certification as required by the contract specification was not essential. This is so "[b]ecause Astro Pak [was] not a signatory to the Greater Las Vegas Plan"; however, the test for

responsiveness of a bid with regard to AAP compliance must be measured not by the presence of a certificate, but "by its commitment to the solicitation's affirmative action requirements." Therefore, in Okland's view, the issue is whether Okland has demonstrated its commitment to the solicitation's AAP requirements.

Okland submitted the affidavit of its president as evidence of the company's commitment to the Arizona Plan and all Federal and State AAP requirements. As stated therein, Okland is currently completing a project in Whiteriver, Arizona, as a subcontractor for construction of the Whiteriver Indian Health Facility. In that project Okland is contractually committed to the Arizona Plan and all Federal AAP requirements. Okland has also committed itself to AAP's in the State of Arizona by filing with the city of Phoenix, Arizona, its AAP on October 1, 1978. In addition, Okland is now and has been a member of the Associated General Contractors of America (AGC), affiliated with the Utah Chapter. As stated in the affidavit, Okland is currently a signatory with several other State chapters of the AGC, all of which are bound to Federal and State AAP requirements, and Okland is signatory to AGC agreements with affiliated trade unions, which union agreements provide for compliance with State and Federal AAP.

In summary, Okland contends that it has a deep commitment to the Arizona Plan as well as all Federal and State AAP requirements. In Okland's view, therefore, Okland has demonstrated "its commitment to the solicitation's affirmative action requirements," its bid is responsive to the solicitation's AAP requirements and Okland is entitled to award of the contract.

Chuska contends that Okland's bid must be rejected as nonresponsive for failure to execute and certify part I and/or part II of the Bid Conditions - Arizona Plan.

I. Current Affirmative Action Specification

We note that the Department of Labor, Office of Federal Contract Compliance Programs, on April 7, 1978, published in 43 Federal Register 14899, "Goals and Timetables for Female and Minority Participation in the Construction Industry," which were to be included in all federally assisted construction contracts and subcontracts for which invitations for bids or other solicitations or amendments were issued on or after May 8, 1978. Since the Alchesay solicitation was issued on June 30, 1978, the following goals and timetables were applicable to the instant procurement:

<u>Women - Nationwide Timetable</u>	<u>Goal (percent)</u>
From April 1, 1978 until March 31, 1979	3.1
From April 1, 1979 until March 31, 1980	5.1
From April 1, 1980 until March 31, 1981	6.9

Minority Utilization - State of Arizona

<u>Timetable</u>	<u>Trade</u>	<u>Goal (percent)</u>
Until further notice	All	25.0 - 30.0

Also published on April 7, 1978, at 43 Federal Register 14894, was the new standard notice provision to be included in federally assisted construction contracts and subcontracts in excess of \$10,000. Unlike the outdated form used in the Alchesay solicitation, the new notice provision does not require separate execution and certification and potential contractors commit themselves to the requirements of affirmative action simply by submitting a properly executed bid or proposal. Moreover, the outdated form did not contain the current required goals and timetables applicable to women. Furthermore, the outdated form appears to permit potential contractors, which would be subject to part II, to escape any trade commitments

of goals and timetables. Thus, the outdated form would not be an acceptable substitute for current requirements.

II. Okland's Commitment to Affirmative Action

Okland's contention--that its past conduct is evidence of its commitment to the Alchesay solicitation's affirmative action goals contained in the outdated form--is academic since that solicitation's goals are ambiguous and incomplete. And Okland's contention--that its contractual commitment to the Arizona Plan on another project is evidence of its contractual commitment to the Arizona Plan on the instant solicitation--is without merit because (1) the projects are independent, and (2) Okland's failure to execute and submit the required form would not result in a legal commitment to the required, specific goals and timetables (50 Comp. Gen. 844 (1971); Northeast Construction Company v. Romney, 485 F.2d 752 (D.C. Cir. 1973)).

We considered a substantially similar situation in McKenzie Road Service, Inc., B-192327, October 31, 1978, 78-2 CPD 310. There, McKenzie's low bid was rejected for failure to acknowledge an amendment which incorporated the current minority manpower utilization goals and timetables. McKenzie argued that the amendment would not have affected its price and the failure to acknowledge the amendment should be waived as a minor informality. We concluded that (1) the amendment was material because it added new provisions for female and minority participation--notwithstanding McKenzie's contention that it always has followed equal employment opportunity guidelines, and (2) McKenzie's failure to acknowledge the amendment or otherwise indicate a commitment in its bid to be bound by the specific goals and timetables rendered McKenzie's bid nonresponsive since a bidder's commitment must be determined from the bid as submitted. Compare Mayfair Construction Company, B-186278, August 10, 1976, 76-2 CPD 148, where, unlike here, use of affirmative action clause different from that prescribed by the Department of Labor was upheld because the

clause used was substantially similar to that prescribed by Labor.

Okland contends that the omitted new minority utilization goals and timetables are not material because they would have no effect on the price Okland bid. By letter dated November 29, 1978, Okland agreed to meet all the appropriate requirements at no additional cost.

Since it has been held that minority manpower utilization goals and timetables are material elements of a solicitation, a bidder, such as Okland, may not be permitted, after the time for bid opening, to agree to accept a material alteration in its bid. The integrity of the competitive bidding system would be destroyed if the apparent low bidder could in effect withdraw its bid--by not agreeing to the material addition--after prices are revealed contrary to the terms of the solicitation.

III. Constitutionality of Specific Goals

Okland argues that the constitutionality and enforceability of the Arizona Plan are seriously in question. Okland states that in the very recent case of Associated General Contractors of California, et al. v. Secretary of Commerce, et al., Civil No. 77-3738-AAH (C.D. Cal. filed October 20, 1978), the court addressed the question of the permissibility of "racial quotas" to promote employment of minority group contractors in light of the Supreme Court's decision in Regents of the University of California v. Bakke, 46 U.S.L.W. 4896 (1978); the court concluded that while affirmative action is permissible, "racial quotas are impermissible and unconstitutional" and, therefore, "the 10% race quota* [is] not a constitutionally

* 42 U.S.C. § 6705(f)(2) (1976) (the minority business enterprises provision).

acceptable means of promoting the Congress' legitimate interest in promoting employment in the construction industry among minority group members." Okland also cites Montana Contractors' Association, et al. v. Secretary of Commerce (D. Mont., filed November 24, 1978) as evidence that racial quotas are unconstitutional. Okland concludes that its lack of compliance with an unconstitutional requirement could not be a basis for refusing award of the contract to Okland.

We note that the minority business enterprises provision has been the subject of conflicting United States District Court decisions. See Constructors Association of Western Pennsylvania v. Kreps, 441 F. Supp. 936 (W.D. Pa., 1977). Accordingly, our Office has taken the position that we will not review protests concerning compliance with that provision until the litigation is finally resolved. Solar Electrical Construction Corporation, B-191531, April 25, 1978, 78-1 CPD 319. Similarly, we do not believe it appropriate for our Office to consider the constitutionality of specific minimum goals in affirmative action programs prior to that issue's final resolution by the courts. See Inter-Con Security System, Inc., B-186347, B-185495, March 7, 1977, 77-1 CPD 165. Accordingly, we will not consider this aspect of the matter.

IV. Conclusion

In summary, regarding Interior's first and third questions, we must conclude that (1) the solicitation as issued did not contain all the current AAP requirements, (2) the omission was material and prejudiced the interest of the Government (see 50 Comp. Gen. 844, supra), and (3) award may not properly be made under the defective solicitation; thus, readvertisement is required.

V. Indian Preference Requirement of Public Law 93-638

Interior's second question essentially requests our views on whether contract awards under Public Law 93-638 grant programs must be made to Indian-owned firms even when the price would be substantially

higher than award to a non-Indian-owned firm. While our conclusion above makes this issue academic here, we comment on this question since it is likely to arise on resolicitation of the instant procurement or in the future.

The Indian Self-Determination and Education Assistance Act provides in pertinent part that,

"Any contract [or] subcontract
* * * pursuant to this Act * * * shall
require that to the greatest extent
feasible * * * preference in the award
of subcontracts * * * shall be given to
Indian organizations and to Indian-owned
[51 percent] economic enterprises * * *."
25 U.S.C. § 450e(b)(2) (1976)

Interior's implementing regulation at 25 C.F.R.
§ 277.28 (1977), entitled "Indian Preference," provides
that:

"(b) Any contract made by the Bureau
with a State or school district shall
provide that the contractor shall,
to the greatest extent feasible, give
preference in the award of subcontracts
to Indian organizations and Indian-owned
economic enterprises."

To the same effect, the solicitation provided, as
follows:

"In accordance with the provisions of
Public Law 93-638, preference will
be given to 51 percent Indian Owned
Economic Enterprises to the maximum
extent feasible in the awarding of any
contract or subcontracts pursuant to
this advertisement."

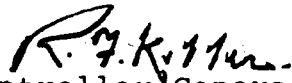
Okland has advised that its research has not surfaced
any legal precedents or case law which explains or amplifies
the meaning of the statutory and regulatory language "to

the greatest extent feasible." Okland contends that while there is a delineated preference for Indian subcontractors in 25 U.S.C. § 450e(b)(2), just as there is a preference for small business set-asides under 15 U.S.C. 644 § (1976), the elements of fair competition and reasonable price must play a part in the contracting officer's decision to award.

Okland does not contend that a nonpreferred bidder whose price is a few dollars lower than a preferred bidder should receive award of the contract because such an interpretation would clearly thwart the legislative intent of the statute and effectively remove the Indian preference; however, if there is a significant price differential between a preferred and a nonpreferred bid, the weight in favor of the preferred bidder may be overcome.

In our view, the language "to the greatest feasible" confers broad discretionary authority, and, therefore, Public Law 93-638 does not require award to Indian-owned firms. When our Office reviews agency determinations made pursuant to such authority, we will not disturb them unless they are arbitrary, unreasonable, or violative of law or regulation. See Department of the Interior--request for advance decision, B-188888, December 12, 1977, 77-2 CPD 454 (the quantum of evidence required for an offeror to establish Indian descent and tribal enrollment). Accordingly, we would review Interior's approval or disapproval of proposed subcontract awards to non-Indian economic enterprises under that standard, which must also be applied by the contractors in the first instance.

By regulation published prior to any resolicitation or by solicitation provision, Interior should definitize the preference that Indian enterprises will receive in this and future procurements because bidders cannot compete on an equal basis as required by law unless they know in advance the basis on which their bids will be evaluated. 36 Comp. Gen. 380, 385 (1956).


Deputy Comptroller General
of the United States